



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

Fabio Bertoni
Hughes Hubbard & Reed
One Battery Park Plaza
New York, New York 10004

SEP 1 2005

RE: MUR 5657
Douglas Lake

Dear Mr. Bertoni:

Based on a complaint filed with the Federal Election Commission on November 24, 2003, and other publicly available information, the Commission, on October 19, 2004, found that there was reason to believe your client, Douglas Lake, violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 110.6(b)(2) and 114.2(f)

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a violation has occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief that you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Elena Paoli, the attorney assigned to this matter, at (202) 694-1548.

Sincerely,

Lawrence H. Norton by RSW
Lawrence H. Norton
General Counsel

Enclosure
Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4) MUR 5657
5 Douglas Lake)
6

7 **GENERAL COUNSEL'S BRIEF**

8
9 **I. INTRODUCTION**

10
11 On October 19, 2004, the Federal Election Commission ("Commission") found reason to
12 believe that Douglas Lake, a former officer of Westar Energy, Inc., violated the Federal Election
13 Campaign Act of 1971, as amended ("the Act") by facilitating or consenting to the facilitation of
14 making earmarked corporate contributions.¹ Specifically, the Commission found that Westar,
15 Lake, and others violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 110.6(b)(2) and 114.2(f). *See*
16 MUR 5573.² The Commission subsequently severed respondent Lake, opened this matter, MUR
17 5657, as to him, and authorized an investigation.

18 The Commission's investigation confirms that Lake was well aware that Westar
19 executives' contributions were being collected and forwarded to federal candidate committees on
20 behalf of Westar or at Westar's expense. Information shows that Lake consented to all aspects of
21 the facilitation, including the forwarding of earmarked contributions by Westar employees and
22 representatives to federal candidate committees.

23 Based on the following factual and legal analysis, the General Counsel is prepared to
24 recommend that the Commission find probable cause to believe that Lake violated 2 U.S.C.

¹ Documents from MUR 5573, including conciliation agreements and certain other documents cited herein, were placed on the public record on August 18, 2005.

² On May 10, 2005, the Commission approved conciliation agreements with Westar, Carl M. Koupal, Jr., and Douglass Lawrence, and on June 23, 2005, the Commission approved a conciliation agreement with outside lobbyist Richard Bornemann, took no further action as to lobbying firm Governmental Strategies, Inc., and closed MUR 5573.

§ 441b(a) and 11 C.F.R. §§ 110.6(b)(2) and 114.2(f) by consenting to the facilitation of earmarked contributions in 2000 and 2002 that totaled \$39,900.

II. SUMMARY OF FACTS

Westar is an electric utility company incorporated in Kansas and headquartered in Topeka, Kansas. *See* Westar Energy, Inc., Conciliation Agreement ("Westar CA"), Part IV, ¶ 1. Douglas Lake was Westar's Vice President for Corporate Strategy from 1998 through December 6, 2002. *See id.* David Wittig was the Vice President of Corporate Strategy at Westar from 1995 to 1998 and its President and CEO from 1998 through November 7, 2002. *See id.* Douglass Lawrence was Westar's Vice President of Government Affairs from late 2001 until he voluntarily resigned at the end of 2002. *See* Douglass Lawrence Conciliation Agreement ("Lawrence CA"), Part IV, ¶ 1. Carl M. Koupal, Jr., was employed at Westar from March 16, 1992 through October 31, 2001, and served as Executive Vice President and Chief Administrative Officer at the times relevant herein. *See* Carl M. Koupal, Jr., Conciliation Agreement ("Koupal CA"), Part IV, ¶ 1.

GSI is a lobbying and consulting firm incorporated in Virginia with its principal place of business in Oakton, Virginia. *See* Richard Bornemann Conciliation Agreement ("Bornemann CA"), Part IV, ¶ 2. GSI has worked as one of Westar's lobbyists since March 1, 2000. *See id.* Richard Bornemann, one of GSI's lobbyists, provided lobbying and consulting services to Westar during times relevant herein. *See id.*

A. SEPTEMBER 2000 SOLICITATIONS

Shortly after the August 2000 primary election in Kansas, Wittig asked Koupal to create a proposed list of candidates for the top Westar executives (the "Executive Council"), including Lake, to support in the upcoming general election. *See* Koupal Affidavit, ¶ 4. Wittig also asked Koupal to propose suggested contribution amounts for the six executives. *See id.* At around the

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1 same time, at a regularly held weekly staff meeting of the Executive Council that Lake attended,
2 Wittig announced that Koupal would be creating such a chart and that it was Wittig's desire for
3 Westar to support these candidates.³ *See id.*, ¶ 6. Wittig said that Koupal would be giving the
4 executives information about their suggested contributions and that they should give their
5 contribution checks to Koupal. *See id.*

6 The chart that Koupal created at Wittig's direction listed four federal candidates – Jim
7 Ryun, Dennis Moore, Todd Tiahrt, and Jerry Moran – and five local and state candidates. *See*
8 Chart, Westar Special Report, Exh. 239. Koupal listed the six Executive Council members by
9 their initials, including Lake, and wrote in a proposed contribution amount for each executive to
10 give to the candidate committees. *See id.* Koupal distributed the chart to Lake and the other five
11 executives and, except for Lake, communicated in person or over the phone with the executives
12 to tell them how and when to write their checks. *See* Koupal Affidavit, ¶ 8.

13 Pursuant to a request by Lake, who was often away from Westar's headquarters, on
14 September 20, 2000, Koupal sent Lake a memorandum with the four federal candidate committee
15 names written out in full. *See id.*, ¶ 11 and Koupal Memorandum, Westar Sua Sponte,
16 Attachment 10. Koupal's memorandum to Lake said, "Please return these checks and we'll
17 deliver them together." *See* Koupal Memorandum and Koupal Affidavit, ¶ 11. On or about
18 September 26, 2000, Lake wrote sequential contribution checks to the federal candidate
19 committees listed in Koupal's September 20 memorandum for the exact amounts requested.
20 Lake forwarded the checks, totaling \$3,000, to Koupal. *See* Koupal Affidavit, ¶ 12. Lake and
21 the other executives, except for Koupal, wrote contribution checks to all the federal candidates
22 listed on the chart in the amounts suggested.

³ The Westar PAC was not active at this time.

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As part of the September 2000 solicitation effort, Koupal collected contribution checks from Lake and the other Executive Council members and sent the checks to the candidate committees. See Koupal CA, Part IV, ¶ 9. Disclosure reports show that Westar executives and/or their spouses made the following contributions in accordance with the 2000 contributions schedule:

DATE OF CONTRIBUTION	AMOUNT	RECIPIENT COMMITTEE
10/16/00	\$1,000	Jim Ryun for Congress
10/16/00	\$2,000 ⁴	Jim Ryun for Congress
10/16/00	\$ 750	Jim Ryun for Congress
10/16/00	\$ 500	Jim Ryun for Congress
10/24/00	\$ 500	Dennis Moore for Congress
10/24/00	\$1,000	Dennis Moore for Congress
10/24/00	\$ 750	Dennis Moore for Congress
10/24/00	\$ 500	Dennis Moore for Congress
10/26/00	\$ 500	Jim Ryun for Congress
10/27/00	\$ 500	Tiahrt for Congress
10/27/00	\$ 500	Tiahrt for Congress
10/27/00	\$1,000	Tiahrt for Congress
10/27/00	\$ 500	Tiahrt for Congress
11/04/00	\$ 250	Moran for Kansas
11/04/00	\$ 500	Moran for Kansas
11/04/00	\$ 250	Moran for Kansas
11/04/00	\$ 250	Moran for Kansas
11/04/00	\$ 250	Moran for Kansas
TOTAL	\$11,500	

In response to the September 2000 solicitation, Lake forwarded checks earmarked for federal candidate committees totaling \$3,000 to Koupal. In total, the September 2000 solicitation resulted in \$11,500 in political contributions from Westar executives that Koupal collected and forwarded as earmarked contribution checks to federal candidate committees.

⁴ This \$2,000 contribution from Wittig on October 16 exceeded contribution limits by \$1,000; on November 1, it was recast by the recipient committee as a \$1,000 contribution from Wittig and a \$1,000 contribution from Wittig's wife.

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B. 2002 SOLICITATIONS

In an April 23, 2002, memorandum to Governmental Affairs Vice President Douglass Lawrence, Koupal's successor at Westar, titled "Federal Elections Participation," lobbyist Richard Bornemann outlined a proposal "to develop a significant and positive profile for the Company's federal presence." *See* Bornemann Memorandum, *available at* http://www.house.gov/ethics/DeLay_pdfs/Exhibit%20K.pdf (April 23, 2002). In the memorandum, he recommended that Westar employees contribute specific amounts to certain federal political committees. *See id.* In total, Bornemann recommended that Westar employees, through individual contributions, contribute \$31,500 in federal funds. Bornemann also recommended that Westar contribute \$25,000 in nonfederal funds. *See id.*

Using the Bornemann memorandum as a guide, Wittig created a contributions schedule that called for 13 Westar executives, including Lake, to make specific contributions to specific federal candidate committees. *See* Lawrence CA, Part IV, ¶ 9. The suggested contribution amounts were based on the executive's pay grade, with higher-salaried executives requested to contribute proportionally more than lower-salaried executives. *See id.* In a May 3, 2002, memorandum to Lake and the other executives on company letterhead, Wittig stated, "We are going to enter the donation season (particularly political), which will require us to write some checks. The attached Donation Schedule is a guideline of how we might share the responsibility."

Thereafter, Lawrence, at Wittig's direction, communicated via email, internal mail and orally with Lake and the other solicited executives to let them know how much and to whom they should write contribution checks and the specific amounts within the monetary framework set by Wittig. *See* Lawrence CA, Part IV, ¶ 10. In a June 25, 2002, memorandum to Lake and the other executives setting forth another round of suggested contribution amounts, Lawrence

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1 explained how the contribution checks delivered up to that time had successfully resulted in
2 favorable legislative action for Westar and why "the next round of checks" were important to
3 the company's financial restructuring plans.⁵ See Lawrence Memorandum, *available at*
4 http://www.house.gov/ethics/DeLay_pdfs/Exhibit%20N.pdf (June 25, 2002).

5 At least through October 18, 2002, Lawrence (and/or his assistant at his direction)
6 collected the executives' contributions, including Lake's checks. See Lawrence CA, Part IV, ¶
7 11. Lawrence then forwarded the checks to the recipient committees, sometimes directly by
8 mail and other times through Bornemann, who then would deliver them to the recipient
9 committees in person or by mail. See *id.* After October 18, 2002, on the advice of counsel,
10 Westar executives, including Lake, began sending their contributions directly to candidate
11 committees by Federal Express, U.S. mail, or other mail service at Westar's expense. See *id.*

12 Westar executives and the spouses of two of the executives made the following
13 contributions from May 31, 2002, through December 19, 2002, which were either collected and
14 forwarded to candidates by Lawrence and/or Bornemann, or sent by the executives by Federal
15 Express or U.S. mail at Westar's expense:

DATE OF CONTRIBUTION	AMOUNT	RECIPIENT COMMITTEE
05/31/02	\$1,000	Tom Young for Congress
05/31/02	\$1,000	Tom Young for Congress
05/31/02	\$1,000	Tom Young for Congress
05/31/02	\$ 300	Tom Young for Congress
05/31/02	\$ 300	Tom Young for Congress
05/31/02	\$1,000	Tom Young for Congress
05/31/02	\$ 400	Tom Young for Congress
06/06/02	\$ 300	Tom DeLay Congressional Committee
06/06/02	\$ 300	Tom DeLay Congressional Committee
06/06/02	\$1,000	Tom DeLay Congressional Committee
06/06/02	\$ 300	Tom DeLay Congressional Committee
06/06/02	\$ 200	Tom DeLay Congressional Committee
06/06/02	\$ 300	Tom DeLay Congressional Committee

⁵ According to Bornemann's memorandum, most of the suggested contribution recipients were either members of or had ties to leaders of the Senate and House energy committees.

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DATE OF CONTRIBUTION	AMOUNT	RECIPIENT COMMITTEE
06/10/02	\$ 500	Northup for Congress
06/10/02	\$ 350	Northup for Congress
06/20/02	\$1,000	Volunteers for Shimkus
06/28/02	\$1,000	Graves for Congress
06/30/02	\$ 350	Shelley Moore Capito for Congress
06/30/02	\$ 650	Shelley Moore Capito for Congress
07/31/02	\$1,000	Bayou Leader PAC
07/31/02	\$ 300	Bayou Leader PAC
07/31/02	\$1,000	Bayou Leader PAC
07/31/02	\$ 500	Bayou Leader PAC
10/18/02	\$1,000	Next Century Fund
10/23/02	\$ 500	NRCCC
10/23/02	\$ 425	NRCCC
10/23/02	\$ 225	NRCCC
10/25/02	\$ 500	Simmons for Congress
10/28/02	\$1,000	Oxley for Congress
10/28/02	\$ 500	Texas Freedom Fund
10/28/02	\$ 500	Texas Freedom Fund
10/28/02	\$ 500	Hayes for Congress
10/29/02	\$ 500	Hayes for Congress
10/29/02	\$ 325	Leadership PAC
10/29/02	\$ 675	Leadership PAC
10/29/02	\$ 500	Latham for Congress
10/29/02	\$ 250	Latham for Congress
10/29/02	\$ 250	Latham for Congress
10/30/02	\$ 500	Simmons for Congress
10/30/01	\$1,000	Team Sununu
10/31/02	\$1,000	The Congressman Joe Barton Committee
11/03/02	\$1,000	Team Sununu
11/04/02	\$1,000	Team Sununu
11/05/02	\$1,000	The Congressman Joe Barton Committee
12/19/02	\$1,000	Texas Freedom Fund
TOTAL	\$28,400	

Lake made seven of these contributions, totaling \$6,300, in response to the 2002 solicitations. When considered with the \$11,500 in contributions forwarded in 2000, *see supra* p. 4, contributions solicited and delivered by Westar executives and agents or sent using Westar resources totaled \$39,900 between September 2000 and December 2002.

1 **III. ANALYSIS**

2 Corporations are prohibited from making contributions or expenditures from their general
3 treasury funds in connection with any election of any candidate for federal office. 2 U.S.C.
4 § 441b(a). In addition, section 441b(a) prohibits any officer or director of any corporation from
5 consenting to any contribution or expenditure by the corporation. Corporations (including
6 officers, directors or other representatives acting as agents for the corporation) also are prohibited
7 from facilitating the making of contributions. 11 C.F.R. § 114.2(f)(1). Facilitation means using
8 corporate resources or facilities to engage in fundraising activities that go beyond certain limited
9 exemptions. *Id.* Examples of facilitation include ordering or directing subordinates who,
10 therefore, are not acting as volunteers, to plan, organize or carry out the fundraising project as a
11 part of their work responsibilities using corporate resources. 11 C.F.R. § 114.2(f)(2)(i).
12 Facilitation also includes, *inter alia*, providing materials for the purpose of transmitting or
13 delivering contributions, such as stamps, envelopes or other similar items. 11 C.F.R.
14 § 114.2(f)(2)(ii).

15 In 2000 and 2002, Westar embarked on two organized efforts to make contributions to
16 federal candidate committees. These efforts went beyond permissible communications to its
17 restricted class concerning recommended candidates and/or contribution suggestions. Acting by
18 and through Lake and other corporate officers and agents, Westar collected earmarked
19 contributions and forwarded them to federal candidate committees. In doing so, Westar
20 facilitated the making of prohibited corporate contributions.

21 Lake violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f) by consenting to Westar's
22 facilitation of prohibited contributions. Lake, as Westar's Vice President of Corporate Strategy
23 and one of the solicited executives, knew of the 2000 and 2002 plans to collect earmarked
24 contribution checks from Westar executives and deliver them to candidate committees. *See*

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supra, pp. 2-3. Moreover, Lake delivered his own checks to Koupal and Lawrence, knowing that the checks would be forwarded to the intended recipients. Lake also used corporate resources to send his own contributions to candidate committees after Westar stopped forwarding checks.

Accordingly, the General Counsel is prepared to recommend that the Commission find probable cause to believe that Lake violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f).

III. RECOMMENDATION

Find probable cause to believe that Douglas Lake violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f).

9/1/05
Date

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